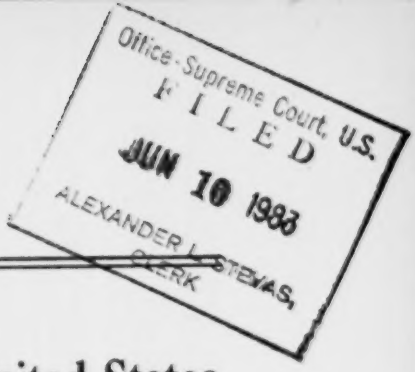
82-2032

No.



In the Supreme Court of the United States

October Term, 1982

GABRIEL C. NEDECZKY,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Second District Court of Appeals
Greene County, Ohio

WILLIAM D. BYER
Counsel of Record
840 Western Reserve Building
Cleveland, Ohio 44113
(216) 781-7777
Attorney for Petitioner

WILLIAM F. SCHENCK
VICKI R. PATTON-HULCE
Office of Greene County Prosecutor
County Courthouse
Xenia, Ohio 45385
(513) 376-5250
Attorneys for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTION PRESENTED

Whether a search warrant which authorizes the search of residential premises justifies the search of a locked container known to the police to be the property of a third party visitor to such premises, where the existence and identity of such visitor and his belongings were unknown to the issuing magistrate.

TABLE OF CONTENTS

QUESTION PRESENTED I
TABLE OF AUTHORITIES III
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3
STATEMENT OF FACTS 4
THE RULINGS BELOW 6
REASONS FOR GRANTING WRIT 7

I. Certiorari Should Be Granted to Resolve Conflicts in Principle Among State and Lower Federal Courts 7

II. Certiorari Should Be Granted Because the Court Below Has Erroneously Applied Constitutional Principles, Relative to Search and Seizure, As Enunciated by This Court 12

CONCLUSION 19

APPENDICES:

Appendix A:

Order of the Supreme Court of Ohio Dismissing the Appeal (April 13, 1983) A1

Appendix B:

Opinion of the Court of Appeals of Greene County, Ohio (November 18, 1982) A2

Judgment Entry of the Court of Appeals of Greene County, Ohio (November 18, 1982) A5

Appendix C:

Judgment Entry of the Court of Common Pleas of Greene County, Ohio (July 2, 1982) A6

Appendix D:

Search Warrant and Affidavit A9

Appendix E:

Excerpts From Transcript of Suppression Hearing A16

TABLE OF AUTHORITIES

Cases

Arkansas v. Sanders, 442 U.S. 753 (1979) 16
Cardwell v. Lewis, 417 U.S. 583 (1974) 14
Chambers v. Maroney, 339 U.S. 42 (1970) 14
Commonwealth v. Platou, 455 Pa. 258 (1973), *cert. den.* 417 U.S. 976 (1974) 7, 8, 9, 10
Johnson v. United States, 333 U.S. 10 (1948) 13
Rakas v. Illinois, 439 U.S. 128 (1978) 14
United States v. Branch, 545 F.2d 177 (D.C. Cir., 1976) 10, 11
United States v. Chadwick, 433 U.S. 1 (1977) 16
United States v. Cole, 628 F.2d 897 (5th Cir., 1980) 10
United States v. DiRe, 332 U.S. 581 (1948) 13, 15
United States v. Gentry, 642 F.2d 385 (10th Cir., 1981) 10
United States v. Micheli, 487 F.2d 429 (1st Cir., 1973) 10, 15
United States v. Ross, 102 S. Ct. 2157 (1982) ..... *passim*
Ybarra v. Illinois, 444 U.S. 85 (1979) ..... *passim*

Constitutional Provisions

Amendment IV to the Constitution of the United States 2, 6, 15, 16, 18, 19
Amendment XIV to the Constitution of the United States 2, 6
Article I, Section 14 of the Constitution of the State of Ohio 6

Statutory Authority

§2925.03(A)(6) of the Ohio Revised Code 2, 3
§2925.11(A) of the Ohio Revised Code 2, 3

No.

In the Supreme Court of the United States

October Term, 1982

GABRIEL C. NEDECZKY,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Second District Court of Appeals
Greene County, Ohio

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Gabriel C. Nedeczky, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for Greene County, Ohio, which judgment became final on April 13, 1983, when the Supreme Court of Ohio dismissed petitioner's Memorandum In Support Of Jurisdiction and denied further appellate review.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is unreported and is printed in Appendix "A" hereto, *infra,* page A1. The judgment of the Court of Appeals for the Second Appellate District, Greene County, Ohio, is printed in Appendix "B" hereto, *infra,* page A2. The Journal Entry of Judgment of the Court of Common Pleas of Greene County, Ohio, is printed in Appendix "C" hereto, *infra,* page A5.

JURISDICTION

The judgment of the Supreme Court of Ohio (Appendix "A", *infra*, page A1) was entered April 13, 1983. The jurisdiction of the Supreme Court of the United States is invoked under the provisions of 28 U.S.C. §1257(3), on the basis that rights, privileges and immunities under the Constitution of the United States are contended to have been violated.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Amendment IV:

"The right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath and particularly describing the place to be searched, and the person or thing to be seized."

Amendment XIV:

"* * * nor shall any State deprive any person of life, liberty or property without due process of law * * *."

Ohio Revised Code

§2925.03(A)(6)

"(A) No person shall knowingly do any of the following: * * * (6) Possess a controlled substance in an amount equal to or exceeding three times the bulk amount; * * *"

§2925.11(A)

"No person shall knowingly obtain, possess, or use a controlled substance."

STATEMENT OF THE CASE

This is a criminal action brought by the State of Ohio against petitioner, Gabriel C. Nedeczky, on two counts of possession of controlled substances, pursuant to Sections 2925.03(A)(6) and 2925.11(A) of the Ohio Revised Code. In the Court of Common Pleas, Greene County, Ohio, petitioner moved to suppress certain evidence on the ground that it had been obtained as the result of an unlawful search and seizure. The trial court granted petitioner's Motion to Suppress, which ruling was appealed by the State of Ohio. The Court of Appeals for the Second Appellate District, Greene County, Ohio, reversed the judgment of the trial court. The Supreme Court of the State of Ohio denied further appellate review.

STATEMENT OF FACTS

On the evening of April 21, 1982, police officers from the Dayton Organized Crime Unit, the Beavercreek, Ohio Police Department and the Greene County Sheriff's Department (Tr. 19, 20)[1] searched the home of Thomas Hotop (Tr. 3, 19, 27, 28) for drugs and drug paraphernalia (Tr. 23), pursuant to a search warrant (Tr. 19). The affidavit in support of the search warrant was based on informant information. The affidavit is void of any statements that any other person other than Hotop lived in Hotop's residence, was assisting Hotop in his narcotics sales or otherwise using the residence for his own illegal drug activity (See Appendix "D").

At the time of said search, petitioner, Gabriel C. Nedeczky, was a visitor at Hotop's residence (Tr. 6).

Petitioner had been playing cards with a third party in Hotop's living room, when the phone rang (Tr. 4, 10). He had answered the phone located at the entrance to the kitchen (Tr. 10) when police officers appeared at the front door, and announced that they had a search warrant to search the premises (Tr. 4, 12). Petitioner went to the door and advised police that he was not Hotop, but that he would bring Hotop to the door; whereupon the officers told him to freeze and open the door or they would break it down. Petitioner then opened the door as directed (Tr. 4, 12).

Upon entry, the officers conducted a "pat-down" search of petitioner (Tr. 5). He was then ordered into the living room and forced to sit on the floor while the search of Hotop's residence was executed (Tr. 21).

---

1. References to the transcript of the hearing of petitioner's Motion to Suppress (in the Court of Common Pleas, Greene County, Ohio, June 17, 1982) shall be abbreviated "Tr."

While in Hotop's bedroom, one of the officers told Hotop that if he cooperated and showed them where he kept his drugs, they could expedite their completion of this search (Tr. 24). Hotop, at this point, directed the police to a bag of cocaine and substantial sums of money belonging to him (Tr. 24).

Subsequently, the police, without Hotop's assistance, located a locked briefcase in the closet of a back bedroom (Tr. 9, 13, 24, 30).

The police took the briefcase to Hotop and asked him if this were his briefcase, to which he replied it was petitioner's personal property (Tr. 14, 15, 28). The police took the briefcase to petitioner, who confirmed that the briefcase was his (Tr. 5, 14, 15, 28, 30, 31).

Petitioner testified that the police confronted him with the briefcase and asked if he would open it, to which he replied in the negative (Tr. 5, 15). Drug Enforcement Agent William Modisett testified that he told Nedeczky that he could open the briefcase or the police would have to force it open, to which petitioner allegedly replied, "Be my guest" (Tr. 31, 32).

Immediately following this exchange, the police took the briefcase to the kitchen, where they forced it open with a knife (Tr. 6, 15, 33). Inside the briefcase were found those items that are now the subject of this challenge (Tr. 29).

At the suppression hearing, Modisett confirmed that at the time of the search of petitioner's briefcase, the police had no doubt that the briefcase was petitioner's personal property (Tr. 34). The record is equally clear that petitioner was not involved in, nor did he observe, any alleged drug transactions during his visit to Hotop's residence (Tr. 17). The police had no personal knowledge or other information relating to petitioner and had no reason to believe that he would be present upon the premises when they executed the warrant (Tr. 22, 23).

THE RULINGS BELOW

Upon the petitioner's Motion to Suppress Evidence, the trial court ruled: (1) that the search warrant itself did not authorize the search of petitioner or his belongings; (2) that no exigent circumstances existed (thus precluding the police authority from searching petitioner without a warrant or extending the warrant to third party petitioner's personalty); and (3) that petitioner did not consent to the search. Accordingly, the court found that the subject search constituted a violation of petitioner's right to be free from unreasonable search and seizure, pursuant to the Fourth Amendment of the Constitution of the United States (as applied to the states via the Fourteenth Amendment), and to Article I, Section 14 of the Constitution of the State of Ohio.

The Ohio Court of Appeals, relying principally on *U. S. v. Ross*, 102 S. Ct. 2157 (1982), concluded that, although the evidence supported the trial court's finding that no exigent circumstances existed, the search of petitioner's locked briefcase was, contrary to the trial court's opinion, within the scope of the warrant to search Hotop's residence. Thus, the Court of Appeals held that the probable cause which defines scope of a premises warrant extends not only to containers which are a part thereof, but also to closed containers which the police know belong to previously unknown visitors to such premises.

Upon petitioner's appeal as of right, the Supreme Court of the State of Ohio dismissed petitioner's appeal, *sua sponte*, on the ground that no substantial constitutional question existed therein.

REASONS FOR GRANTING WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN PRINCIPLE AMONG STATE AND LOWER FEDERAL COURTS.

The sole issue presented to this Court is whether a search warrant which authorizes the search of a residential premises justifies the search of a locked container known to the police to be the property of a third party visitor to such premises, where the existence and identity of such visitor and his belongings were unknown to the issuing magistrate. Significant to this issue is the trial court's finding that no exigent circumstances existed to justify an intrusion upon petitioner's property.

The Ohio Court of Appeals, while agreeing with the trial court's findings regarding the absence of exigent circumstances, nevertheless upheld the search of petitioner's briefcase as falling within the scope of the warrant to search Hotop's premises.

Such ruling is in direct conflict with that of the Supreme Court of another state, rendered in a case virtually identical to the instant matter, in terms of factual setting and issues. In *Commonwealth v. Platou,* 455 Pa. 258 (1973), *cert. denied* 417 U.S. 976 (1974), the police had obtained a warrant to search the apartment of one Robert Wander. At the time the police entered Wander's apartment to execute the warrant, they became aware for the first time that Peter Platou was visiting Wander's apartment. They proceeded to search two suitcases which, to their knowledge, belonged to Platou. The court held that the evidence discovered therein must be suppressed.

> If a warrant permits the search of premises or effects of a particular person, as here, then it cannot be ex-

> tended by the officer executing the warrant to include a search of things not belonging to or under the control of that person. In the instant case, it is undisputed that Wander had no control over Platou's personal effects. Moreover, the police before undertaking their search were on notice that the suitcases belonged to Platou, and not Wander. *The property of (Platou) cannot be searched under the authority of a warrant for the premises of Wander. If it could, Platou would not be afforded his Fourth Amendment guarantee with regard to his property, because no magistrate ever decided that probable cause existed for the search of his effects* . . . The police had no knowledge of the existence of Platou, or of his property, prior to the time they entered Wander's apartment. A fortiori, neither did the issuing magistrate. The warrant therefore could not possibly have described Platou's effects. *If the officer executing the warrant, by his own choice, could extend its reach by searching things not particularly described therein, the constitutional prescription of particularity would be violated.*

Id. at 262-63 (1973) (Emphasis added).

In the present controversy, neither the police nor the issuing magistrate were aware that petitioner would be present at Hotop's residence, nor did they even know of his identity. The search warrant and affidavit upon which it was based make repeated reference to Thomas Hotop and his involvement in drug transactions. The affiant stated that he had reliable information of at least three separate transactions in which Hotop was involved and which took place in Hotop's residence. However, nowhere in the affidavit or warrant is it alleged that any party other than Hotop was involved. Clearly, no reference to petitioner was made or implied in such affidavit.

Since neither the police nor the issuing magistrate were aware of petitioner's existence prior to the time the police entered Hotop's house, the warrant could not possibly have described petitioner's personal effects. No finding of probable cause, relative to petitioner or his belongings, was ever made by a neutral and detached magistrate. Thus, the reasoning in the *Platou* case should preclude expanding the scope of the instant warrant to include petitioner or his belongings.

Nevertheless, the ruling of the Ohio Court of Appeals upholding the search of petitioner's briefcase necessarily is grounded on the principle either that the scope of a warrant to search residential premises includes the search of locked containers belonging to any person who happens to be present on the premises at the time of the execution of the warrant, or that the scope of a premises warrant may be expanded, *ad hoc,* by the executing officers, even absent exigent circumstances.

As such, the ruling in the instant case is in direct and irreconcilable conflict with that of the Supreme Court of Pennsylvania on matters affecting substantial rights under the Constitution of the United States.

Thus, both decisions involved the reasonableness of the search of a visitor's belongings, vis-a-vis the scope of the search warrant, and the courts reached diametrically opposite results. Therefore, citizens are being afforded varying degrees of constitutional protection, relative to search and seizure, depending upon which state they happen to reside in.

In the instant matter, the Ohio Court of Appeals rejected the reasoning of the *Platou* case due, in large part, to its belief that *United States v. Ross,* 102 S. Ct. 2157 (1982), stands for the proposition that a premises warrant

extends to the search of any containers found therein—even when such container is known to belong to a hitherto unknown visitor to the premises and could not, therefore, have been expected to be on the premises or connected in any way with the suspected criminal activity. However, the *Ross* holding in no way overrules *Platou* or precludes its application to the instant matter. Since *Ross* did not involve the presence of a visitor or his belongings, it cannot be controlling in the resolution of the instant controversy. As will be discussed more fully in Part II of this Argument, the instant matter is closer factually to *Ybarra v. Illinois,* 444 U.S. 85 (1979), and should be decided in accordance therewith.

There also exists some conflict among the lower federal courts relative to the search of visitors and their belongings during the search of residences. The courts in *U. S. v. Cole,* 628 F.2d 897 (5th Cir. 1980), *U. S. v. Branch,* 545 F.2d 177 (D.C. Cir., 1976), and *U. S. v. Micheli,* 487 F.2d 429 (1st Cir. 1973), determine the lawfulness of the search of a visitor's belongings by focusing upon the known relationship of the visitor to the searched premises and the suspected criminal activity.[2]

U. S. v. Gentry, 642 F.2d 385 (10th Cir. 1981), on the other hand, held that the search of a visitor's belongings was justified, under a premises warrant, where the police could reasonably have assumed that such container was used to store items which were the subject of the search.

Thus, the various Courts of Appeals, in applying different tests to determine the reasonableness of the search

---

2. While not expressly relying upon these cases, the trial court, in finding that no exigent circumstances were present, implicitly recognized that the executing officers had no knowledge of any such relationship as would justify the search of petitioner's briefcase.

of visitors' belongings, reach contrary results in similar factual settings. Since substantial constitutional rights are affected by such conflicting decisions, the standards relative to the search of visitors' belongings should herein be clarified by this Court.

There also exists, at least arguably, a conflict among the inferior federal courts as to whether different standards of reasonableness apply in cases of the search of a visitor's *person* as opposed to cases involving the search of a visitor's *belongings*. In *U. S. v. Branch, supra,* the court's decision impliedly rested, in part, on the theory that a visitor's person was entitled to greater constitutional protection than his belongings and that the proximity of the belongings to the visitor determines whether the disputed search constitutes a search of a person or of his belongings.

In the judgment herein appealed from, the court held that the scope of a premises search warrant—absent exigent circumstances or consent—includes the search of a locked container known to the executing police officers to belong to a visitor to such premises. Central to the subject ruling is the Ohio appellate court's conclusion that petitioner's briefcase was not within his immediate possession and that, therefore, the search was justified as not being a search of petitioner's *person*.

As discussed above, federal and state courts are in a state of conflict regarding such issues and, thereby, provide divergent degrees of constitutional protection against unreasonable search and seizure. The instant controversy provides a suitable factual setting and presentation of issues under which this Court, by asserting its jurisdiction, can resolve and clarify such conflicts among state and federal courts.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT BELOW HAS ERRONEOUSLY APPLIED CONSTITUTIONAL PRINCIPLES, RELATIVE TO SEARCH AND SEIZURE, AS ENUNCIATED BY THIS COURT.

In the instant matter, the opinion of the Ohio Court of Appeals sets forth the principle that the probable cause which justifies the search of a residence extends to any container found within the residence, despite the fact that the police know that a container belongs to a previously unknown visitor to the premises. Thus, the Court's opinion establishes, as a matter of constitutional law, that probable cause may be transferred from a residence and its owner to a third party and his belongings, merely because such belongings are present on the premises during the execution of the warrant.

The facts herein are uncontroverted that petitioner was a visitor in Hotop's house and that the police officers executing the warrant knew that the subject locked briefcase was the property of petitioner. It is further indisputable that neither the issuing magistrate, at the time the warrant was issued, nor the police, at the time they entered Hotop's house, was aware of the existence or identity of petitioner. Nor did they anticipate his presence, or the presence of his briefcase, within Hotop's house on the night of the search. Despite agreeing with the trial court's finding that no exigent circumstances were present to justify the search of petitioner's briefcase, the Ohio Court of Appeals held that said search fell within the scope of the warrant to search Hotop's house.[3]

---

3. Respondent, in its argument in the Supreme Court of Ohio, attempted to draw petitioner within the scope of the warrant by implying petitioner's involvement in previous drug transactions at Hotop's residence and in the alleged destruction

(Continued on following page)

The court's ruling was based primarily on its belief that *United States v. Ross,* 102 S. Ct. 2157 (1982), mandates the conclusion that a warrant to search a house authorizes the search of any containers found therein, regardless of who owns such containers. This reliance is clearly misplaced

In *Ross,* police officers had probable cause to believe that the *defendant* was involved in illegal drug transactions and that *he* had drugs in the trunk of *his* car. The police officers thereupon arrested Ross, and without a warrant, searched the trunk of his vehicle, where they found and searched a closed brown paper bag and a zippered leather pouch containing heroin and substantial sums of money. This Court held that no additional search warrant was necessary to justify the search of these containers, since the probable cause that existed to search the automobile would necessarily include any containers found therein which may conceal the object of the search.

Footnote continued—

of evidence. However, the trial court, after noting conflicts in the testimony regarding the alleged destruction of evidence, found that no exigent circumstances were present. Moreover, it was not until after the search that the police discovered that petitioner had been a guest in Hotop's home prior to the date of the search.

The facts of this case are undisputed that, prior to the search of petitioner's briefcase, the executing officers had no personal knowledge or other information relating to petitioner and had no reason to expect that he would be present upon the premises when they executed the warrant. Indeed, it was not until after said search that the police learned that petitioner had been a visitor at Hotop's residence for five days prior to the date of the search (See Tr. 22, 23, attached hereto as Exhibit E).

Since the validity of a search is to be determined by reference to the knowledge of the executing officers *at the time of the search*—and not by what is subsequently discovered—none of these allegations can serve to bring petitioner within the scope of the warrant. *See, Johnson v. U. S.,* 333 U.S. 10 (1948); *U. S. v. DiRe,* 332 U.S. 581 (1948).

In the instant case, the appellate court, in upholding the search of petitioner's briefcase, gave to the holding of *United States v. Ross, supra,* an interpretation never intended and in so doing created an irreconcilable conflict with the holding of *Ybarra v. Illinois,* 444 U.S. 85 (1979).

In *Ybarra,* the Court ruled that a warrant authorizing the search of a tavern does not authorize the search of patrons of the tavern, who happen to be present during the execution of the warrant, where neither the police nor the issuing magistrate had probable cause to believe that any person found in the tavern, other than the bartender, would be violating the law.

Thus, while the *Ross* holding may stand for the proposition that, in general, an automobile warrant authorizes the search of containers found within the automobile,[4] it does not stand for the proposition that the executing officer may search sealed containers which they know belong to third party *visitors* about whom they have no previous knowledge. Such an application of *Ross,* in situations where exigent circumstances are not present, would effec-

---

4. It is questionable that the *Ross* holding should be extended to the search of a person's residence, since the search of a motor vehicle was involved. Insofar as the *Ross* holding depended upon the exigent circumstances involved in the "automobile exception" to the warrant requirement, it is clearly inapposite to the search of a non-mobile residence. It is generally recognized that less stringent requirements are applied to searches of motor vehicles than to searches of homes. In addition to the inherent mobility of automobiles, such recognition is based upon the reasoning that people have lower expectations of privacy with respect to their vehicles than they do regarding their homes, and that searches of automobiles are deemed less intrusive than searches of homes. *Rakas v. Illinois,* 439 U.S. 128 (1978); *Cardwell v. Lewis,* 417 U.S. 583 (1974); *Chambers v. Maroney,* 339 U.S. 42 (1970). Therefore, the standards applied in cases involving searches of automobiles do not provide cogent guidance with respect to the search of a residence.

tively eliminate the probable cause requirement, relative to visitors, which the Fourth Amendment demands.[5]

Such construction of the *Ross* holding would implicitly overrule *Ybarra,* rendering it a nullity. If this were intended, this Court would have so specified. Clearly the *Ross* decision was not meant to sweep so broadly—and cannot be so construed, since the issue of the rights of a third party visitor to premises was not therein before the Court.

In the instant matter, the warrant and affidavit supporting the search of Hotop's residence reflected no finding of probable cause as to petitioner or his briefcase. Since no consent or exigent circumstances were present to justify the search of petitioner's briefcase, the ruling of the Ohio Court of Appeals herein applied *Ross* in a manner contravening elementary constitutional principles.[6]

The Ohio appellate court's misreading of *Ross* led it to conclude, essentially, that a finding of probable cause

---

5. The holdings of the two cases need not and should not be read as inconsistent. This Court, in deciding the *Ross* and *Ybarra* cases, has in reality created separate and distinct doctrines relating to searches of premises (cars or homes). First, the lawful search of an automobile justifies the search of containers which may be expected to be found therein. Second, where a container clearly belongs to a visitor to the premises, whose existence and identity were previously unknown, a search of the premises cannot lawfully extend to such a container, since it could not have been expected to be found on the premises.

6. Clearly, a person's mere presence during the execution of a premises warrant does not justify the search of his person or of his belongings. *Ybarra v. Illinois, supra; U. S. v. DiRe, supra.*

> It should not be assumed that whatever is found on the premises described in the warrant necessarily falls within the proper scope of the search; rather it is necessary to determine why a person's belongings happen to be on the premises . . . [T]he protective boundary established by requiring a search warrant should encompass those extensions of a person which he reasonably seeks to preserve as private, regardless of where he might be.

U. S. v. Micheli, supra.

may be transferred from the owner of a residence to a visitor thereto and his belongings, in contravention of the *Ybarra* holding. The court erroneously held that *Ybarra* controls only in cases involving searches of persons and that *Ross* controls in all cases involving the search of containers.[7]

---

7. Respondent argued below that, since petitioner was not in physical possession of his briefcase at the time of the search, *Ybarra* does not apply. Presumably (according to respondent's argument and the appellate court's opinion), had petitioner been more fleet of foot and had managed to place the contents of the briefcase in his pocket, *Ybarra* would have controlled and any search of petitioner's person would have been improper. One must question any purported constitutional standard which is based upon such merely fortuitous circumstances.

Although *Ybarra v. Illinois, supra,* involved the search of a visitor's person rather than his personal belongings, its holding clearly applies to such belongings as well. The Fourth Amendment protects personal effects to the same extent, and for the same reasons, that it protects persons from unreasonable intrusions. *Arkansas v. Sanders,* 442 U.S. 753 (1979); *United States v. Chadwick,* 433 U.S. 1 (1977).

Accordingly, the contention that *Ybarra* is distinguishable from the facts of the instant controversy merely because it involved the search of a person rather than his briefcase, is artificial and not compelling. The court, by recognizing such a distinction without a difference, manifested the error of its reasoning.

Ybarra's holding is directly applicable to the instant matter. If the issuing magistrate made no probable cause finding relative to a visitor to the searched premises, then the scope of the warrant cannot be deemed to encompass such visitor. Since there exists no viable constitutional distinction, in terms of the probable cause requirement, between the search of a person and the search of his personal effects, the scope of a premises warrant cannot encompass a visitor's locked briefcase—at least not when the executing police officers are indisputably aware that such briefcase belongs to the visitor.

Had the executing officers in the instant case been unaware that the briefcase belonged to petitioner, it might cogently be argued that the premises warrant justified the search of the briefcase, since the police could reasonably have viewed it as being a part of the premises. However, such are not the facts of this case. Here, the police were clearly and admittedly aware that the briefcase did not belong to Hotop and that it would not normally be found in his house.

Respondent further argued below that application of *Ybarra* to the instant matter would be tantamount to requiring that additional warrants must be obtained for any container within a container. This is pure nonsense.

Obviously, the *Ross* holding precludes any serious argument that an additional warrant must be obtained in order to search each separate container found within the searched premises. However, in *Ross,* the same probable cause which justified the search of the automobile also justified the search of any containers found therein. Since there was no question that the containers belonged to the sole occupant of the car, the containers were deemed conceptually identical—in terms of probable cause—to the automobile itself. The Court, *under these facts,* considered it redundant to require an additional warrant to search each of the containers found in the automobile.

However, the facts of the instant case add another dimension to the issue at hand. These additional facts—i.e., that petitioner was a *visitor* in Hotop's home, that the police knew and had every reason to believe that the briefcase belonged to petitioner, and that, while the issuing magistrate had made a finding of probable cause as to Hotop's premises, he made no such finding as to the third party visitor, petitioner, and his personal belongings—place the resolution of this matter beyond the scope of the *Ross* ruling and squarely within the framework of *Ybarra.*

Thus, *Ybarra* would not require an additional warrant to search containers which were expected to be on the premises; it would only require that the search of a previously unknown visitor or his belongings be justified by a finding of probable cause by a neutral and detached magistrate. This requirement constitutes no extension of existing constitutional principle, but only a clarification thereof.

This Court should assert jurisdiction and resolve this matter in order to complete the trilogy it has commenced in its decisions in *Ross* and *Ybarra*. Both *Ross* and *Ybarra* involved the lawful search of a given area—in *Ross*, an automobile, and in *Ybarra*, a residence. *Ross* involved the search of a container located during the valid search of an automobile, but did not involve the presence of a visitor. *Ybarra* involved the search of a visitor's *person* pursuant to a premises warrant, but it did not involve the presence of a container. The instant matter completes this conceptual area by presenting the issue of the search of a visitor's briefcase, pursuant to a premises warrant. In all three cases, probable cause existed to justify the search of the enclosed area itself. The question presented herein is whether such probable cause can extend to a closed container known to belong to a previously unknown visitor. Although the *Ybarra* reasoning applies equally well to personal effects as to persons, sufficient confusion exists among lower federal courts and state courts to warrant this Court's attention to the instant issue.

By asserting jurisdiction in this matter, this Court can clarify substantial constitutional issues. In so resolving the case at hand, this Court may, with greater specificity, define the scope of constitutional protection due to persons and their belongings when located upon the premises of another.

This Court must not permit the State of Ohio to circumvent the protection afforded by the Fourth Amendment by transferring a finding of probable cause from the owner of a premises to the belongings of a visitor thereto. Neither should this Court permit Ohio to create one standard governing the search of persons and a lesser standard regarding the search of personal effects. To allow the Ohio decision to stand would be to vary Fourth Amendment protection on the basis of mere location.

CONCLUSION

If the decision of the Court of Appeals is permitted to stand, it will be permissible to search a person's belongings absent probable cause, exigent circumstances or consent. Since a finding of probable cause by a neutral and detached magistrate remains the cornerstone of Fourth Amendment reasonableness, this Court should not remain silent on such a clear example of constitutional error. Furthermore, in order to resolve substantial conflict and confusion among state and lower federal courts on this issue, it is necessary that this Court address itself to the instant matter.

Respectfully submitted,

WILLIAM D. BEYER
Counsel of Record
840 Western Reserve Building
1468 West Ninth Street
Cleveland, Ohio 44113
(216) 781-7777
Attorney for Petitioner

APPENDIX A

Order of the Supreme Court of Ohio Dismissing the Appeal

(Dated April 13, 1983)

No. 83-75

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellee,

vs.

GABRIEL C. NEDECZKY,
Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR GREENE COUNTY

This cause, here on appeal as of right from the Court of Appeals for Greene County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

APPENDIX B

Opinion of the Court of Appeals of Greene County, Ohio

(Rendered on November 18, 1982)

Case No. 82-CA-36

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellant,

vs.

GABRIEL NEDECZKY,
Defendant-Appellee.

OPINION

WILSON, *J.*

On April 21, 1982, a warrant was issued to search for "cocaine" and other drug related items "concealed in the residence of Thomas Charles Hotop, 1919 Grangeview Drive, City of Beavercreek, Greene County, Ohio, a . . . single-family dwelling."

The defendant, Gabriel Nedeczky, opened the door of the Hotop residence when the warrant was executed. He had been a guest of Hotop for several days prior to the search.

During the course of the search a locked briefcase was found in Hotop's bedroom closet. Both Hotop and Nedeczky told the police officers that the briefcase belonged to Nedeczky.

One officer testified that he took the briefcase to the room in which the defendant was being held and told him "either you open it or I'll break it open." The defendant's response was "Be my guest." The combination lock on the briefcase was then forced by using a knife. Cocaine was found in the briefcase.

After indictment and arraignment the defendant moved to suppress the evidence found in the briefcase. The court sustained the motion to suppress finding that the defendant had not consented to the search. The state has appealed from that order.

The validity of the search warrant was not an issue at the suppression hearing.

The findings of the trial court that the search was nonconsensual and without exigent circumstances were supported by the evidence; however, it does not necessarily follow that the motion to suppress should have been sustained.

We are not concerned here with one of the exceptions which makes a warrantless search reasonable. The issue here is whether a valid search warrant "particularly describing the place to be searched, and the . . . things to be seized" includes within its scope a search of the defendant's briefcase.

A warrant to search fixed premises does not include within its scope the right to search all persons found on the premises. *United States v. Di Re* (1948), 332 U.S. 581; *Ybarra v. Illinois* (1979), 444 U.S. 85. Nedeczky did not physically possess the briefcase immediately prior to the search of the Hotop residence. Nedeczky also had a relationship to the premises which was more than that of a mere casual visitor. Under the facts of this case, the search of the briefcase would not be an extension

of a search of Nedeczky's person. *United States v. Gentry* (1981), 642 F. 2d 358; *United States v. Micheli* (1973), 487 F. 2d 429; *United States v. Johnson* (1973), 475 F. 2d 977; *United States v. Neet* (1981), 504 F. Supp. 1220.

"A container that may conceal the object of a search authorized by a warrant may be opened immediately: the individual's interest in privacy must give way to the magistrate's official determination of probable cause." *United States v. Ross* (1982), 102 S. Ct. 2157.

It is both logical and reasonable to believe that cocaine could be concealed in Nedeczky's briefcase.

The order sustaining the motion to suppress evidence is reversed.

KERNS, *P.J.*, and BROGAN, *J.*, concur.

Judgment Entry of the Court of Appeals of Greene County, Ohio

(Rendered on November 18, 1982)

Case No. 82-CA-36

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellant,

vs.

GABRIEL NEDECZKY,
Defendant-Appellee.

FINAL ENTRY

Pursuant to the opinion rendered by this Court on the 18th day of November, 1982, the order sustaining the motion to suppress evidence is reversed.

/s/ JOSEPH D. KERNS
Presiding Judge
/s/ RICHARD K. WILSON
Judge
/s/ JAMES A. BROGAN
Judge

APPENDIX C

Judgment Entry of the Court of Common Pleas of Greene County, Ohio

(Filed July 2, 1982)

Case No. 82-CR-122

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO

STATE OF OHIO,
Plaintiff,

vs.

GABRIEL NEDECZKY,
Defendant.

JUDGMENT ENTRY

On the 17th day of June, 1982, this matter came on to be heard on Defendant's Motion to Suppress.

Factually, a search warrant was obtained for the residence of Thomas C. Hotop. Defendant, Gabriel Nedeczky, a guest, was present at the time of the search, by his own testimony, and had been there for several days. During the course of the search of the premises by officers from Beavercreek, Dayton Crime Unit, Federal officers, etc. a combination lock briefcase was discovered which was in fact locked. Both Thomas C. Hotop and Gabriel Nedeczky informed agent Modesitt that the briefcase belonged to Nedeczky. Nedeczky's testimony was that he refused to open the briefcase. Officer Modesitt's testimony was that he told Nedeczky, "Either you open

it or I'll break it open" and Nedeczky's response was, "Be my guest." The briefcase was taken into another room where it was broken open.

The issue brought before the Court is whether, in light of the conflicting testimony of Nedeczky and Agent Modesitt, the breaking open of the briefcase constituted a nonconsensual search.

Article 1 § 14 of the Ohio Constitution is modeled after the Fourth Amendment to the United States Constitution. This provision protects the right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures. The search and seizure must be confined to the person, place, and/or property specified in the warrant and unless the warrant names the person to be searched, the officers have no right to search any person or persons that may be on the premises at the time a warrant is being served. *State v. Vuin,* 89 O.L. ABS. 193 (CP), *Columbus v. Buehler,* 23 O.N.P. NS 589, *Commonwealth v. Platou,* 455 Pa. 258 (1973).

The Court in *United States v. Neet,* 504 F.Supp. 1220 (D.Col. 1981) and *United States v. Johnson,* 475 F.Supp. 977 (D.C. 1973) allowed the search and seizure of defendant guests' possessions because of the exigency created by the defendant by either actively destroying the evidence or attempting to escape the residence. The evidence pertaining to Nedeczky was secured in the briefcase and he made no attempt to escape, thus no exigency was created warranting the search of the briefcase.

It is alleged one of the officers in the search observed Nedeczky attempting to dump a substance into the kitchen sink. The briefcase in question and the contents within it were not involved. One officer has testified as to this

matter. Nedeczky denies this act and the end result is conflicting testimony between Nedeczky and the officer.

It is uncontroverted evidence that the briefcase belonged to Nedeczky and the officer was aware of this ownership. At the time of identification, the officer present could have retained custody of the briefcase and obtained a warrant to search the briefcase. The officer, upon identification of the briefcase, forced it open.

The Court finds that this constitutes a nonconsensual search, no exigent circumstances having been demonstrated, violating Defendant's Fourth Amendment Rights.

The Motion to Suppress is therefore SUSTAINED.

Exceptions Noted.

So ORDERED.

/s/ EDWARD R. KIMMEL
Judge

APPENDIX D

SEARCH WARRANT

Fairborn Municipal Court,

Fairborn, Greene County, Ohio

No.

The State of Ohio, Greene County, ss.

To Det. Robert Clemmer and officers of the Greene County Sheriff's Dept., (Name and Title) GREETINGS:

Whereas there has been filed with me an affidavit, of which the following is a copy:

The State of Ohio, Greene County, ss.

Before me Judge Karl Wettlaufer

personally appeared

Det. Robert Clemmer *who being duly sworn according*

to law, deposes and says that on or about the 21st *day of* April *19* 82,

at the County of Greene, *one* Thomas Charles Hotop

had and still has in his possession, the following personal property for which search authorization and seizure is sought, to-wit:

cocaine, marijuana, cash currency, receipts, drug paraphernalia

knowing the same to be illegally possessed or evidence of trafficking in controlled substances

and that said complainant believes and has good cause to believe that said property, or some part thereof, is concealed in the residence of Thomas Charles Hotop, 1919 Grangeview Drive, City of Beavercreek, Greene County, Ohio, a 2-story, brick, single-family dwelling trimmed in cedar with attached 2-car garage and surrounded by a privacy fence, the number 1919 appearing on both the residence and mailbox located in front of the residence.

Complainant further avers the facts upon which such belief is based are:

SEE ATTACHED AFFIDAVIT MARKED EXHIBIT "A"

Det. Robert Clemmer *Affiant*

Sworn to before me and subscribed in my presence this 21st *day of* April, *19* 82.

JUDGE KARL WETTLAUFER

These are therefore to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the nighttime into 1919 Grangeview Drive

of the said City of Beavercreek ~~of the Township of~~

in the County aforesaid, and there diligently search for the said goods

and chattels, or articles, to-wit: cocaine, marijuana, cash currency, receipts, drug paraphernalia

and that you bring the same or any part thereof, found on such search

within three days of the issuance of this warrant forthwith before me, ~~as soon as possible thereafter~~ to be disposed of and dealt with according to law.

Given under my hand, this 21st day of April , 1982 .

Clerk

JUDGE KARL WETTLAUFER By

Deputy Clerk

1 Here name or describe the person to be searched

2 daytime or nighttime as the case may be

3 If applicable insert and also the body of

RETURN

, Ohio, , 19 .

Received this writ on the day of , 19 , at o'clock M., and pursuant to its command I executed the same on the day of , 19 , by searching the premises therein described for the person and or things therein set forth, in the [1] time of said day

whereupon I did seize the following things and/or persons, to-wit:

and now have them before the Court.

FEES

Service and Return

Mileage miles at

Total

Chief of Police—Bailiff

By

Deputy

[1] "day or night"

No. Page Page

Court, , Ohio

In the Matter of the Search of

SEARCH WARRANT

Returned and Filed , 19

Clerk

Deputy Clerk

(Sign as Copy to be Served only.)

I certify this to be a true copy of the original and of the endorsements thereon.

Chief of Police—Bailiff

Deputy

Barrett Brothers, Publishers, Springfield, Ohio

AFFIDAVIT and JOURNAL ENTRY for Search Warrant

Rev. Code Sec. 2933.21, .22, .23

Fairborn Municipal Court

Fairborn, Greene County, Ohio

In the Matter of the Search of
The residence of Thomas Charles Hotop, 1919 Grangeview Drive, City of Beavercreek, Greene County, Ohio, a 2-story, brick, single-family dwelling trimmed in cedar with attached 2-car garage and surrounded by a privacy fence, the number 1919 appearing on both the residence and mailbox located in front of the residence

No.

AFFIDAVIT

The State of Ohio, Greene County, ss.

Before me Judge Karl Wettlaufer

personally appeared

Det. Robert Clemmer

who being duly sworn according to law, deposes and says that on or about the 21st *day of* April *1982,*

at the County of Greene *, one* Thomas Charles Hotop

had and still has in his *possession, the following personal property for which search authorization and seizure is sought, to-wit:* [1] cocaine, marijuana, cash currency, receipts, drug paraphernalia

knowing the same [2] to be illegally possessed or evidence of trafficking in controlled substances

and that said complainant believes and has good cause to believe that said property is now, and has been for a period of time prior to the filing hereof, is concealed in [3] the residence of Thomas Charles Hotop, 1919 Grangeview Drive, City of Beavercreek, Greene County, Ohio, a 2-story, brick, single-family dwelling trimmed in cedar with attached 2-car garage and surrounded by a privacy fence, the number 1919 appearing on both the residence and mailbox located in front of the residence

Complainant further avers the facts upon which such belief is based are:

SEE ATTACHED AFFIDAVIT MARKED EXHIBIT "A"

Det. Robert Clemmer *Affiant*

Sworn to before me and subscribed in my presence this 21st *day of* April *, 1982*

JUDGE KARL WETTLAUFER

---

1 See 2933.21, R.C.
2 Allege the offense committed
3 If applicable name the person or persons to be seized
4 Describe the house or place to be searched
5 If search to issue in the night - insert "Complainant further says there is urgent necessity for a search in the nighttime for the reason

Fairborn Municipal Court,

Fairborn, Greene County, Ohio

In the Matter of the Search of
the residence of Thomas Charles Hotop, 1919 Grangeview Drive, City of Beavercreek, Greene County, Ohio, a 2-story, brick, single-family dwelling trimmed in cedar with attached 2-car garage and surrounded by a privacy fence, the number 1919 appearing on both the residence and mailbox located in front of the residence.

No.

JOURNAL ENTRY

This matter came on for consideration this 21st *day of* April , 1982 , *on the affidavit of* Det. Robert Clemmer *for a search warrant and the evidence, and it appears to the Court that there is probable cause that the following persons or things, to-wit:*

cocaine, marijuana, cash currency, receipts, drug paraphernalia

are concealed in the residence of Thomas Charles Hotop, 1919 Grangeview Drive, City of Beavercreek, Greene County, Ohio, a 2-story, brick, single-family dwelling trimmed in cedar with attached 2-car garage and surrounded by a privacy fence, the number 1919 appearing on both the residence and mailbox located in front of the residence,

; that the offense described in the affidavit has been committed, that the premises and things to be searched are within the jurisdiction of this Court; [1]

It is therefore ordered that a search warrant issue accordingly, and that the Sheriff make return thereof not later than three days from the issuance of said warrant.

KARL WETTLAUFER *Judge*

[1] If applicable, insert "that there is urgent necessity for search of said premises on the night season —otherwise, the warrant will issue for service in the daytime."

No. Page
Page
Page

Court,
Court

In the Matter of the Search of

AFFIDAVIT and JOURNAL ENTRY
for
SEARCH WARRANT

Entries

filed , 19
filed , 19

Harvell Brothers, Publishers, Springfield, Ohio

EXHIBIT "A"

AFFIDAVIT

STATE OF OHIO) ss:
GREENE COUNTY)

1. Affiant, Det. Robert Clemmer, does hereby depose and say that he is a detective with the Dayton Organized Crime Unit, City of Dayton, Montgomery County, Ohio. Affiant states that on April 16, 1982, he received information from a confidential and reliable informant that one Thomas Charles Hotop was selling large quantities of "blond" hashish and cocaine from his residence at 1919 Grangeview Drive, City of Beavercreek, Greene County, Ohio.

2. The informant states that on April 16, 1982, he/she personally purchased one pound of "blond" hashish during the evening hours at 1919 Grangeview Drive, Beavercreek, Ohio, from the subject, Thomas Charles Hotop. The informant reported that he paid $975.00 to Hotop for the controlled substance.

3. The informant further states that on April 16, 1982, he was at the residence for approximately thirty minutes and saw the suspect, Thomas Charles Hotop, sell cocaine to three white male subjects in the above-described residence.

4. The Affiant believes that the confidential informant is both credible and reliable because the informant has provided information within the last year that has led to the arrest of at least five subjects for narcotic related offenses. The informant has also made several controlled drug buys for the Affiant in the recent past.

5. The Affiant states that he has received information from a second credible and reliable informant that

said informant bought one-half pound of "blond" hashish on April 20, 1982 for the price of $575.00. This purchase was a controlled buy under the direction of the Affiant at the same residence listed above. This purchase was also made in the evening hours on April 20, 1982.

6. Affiant states that a third confidential and reliable informant states and reports that he was in the above-described residence on April 20, 1982, and personally saw large quantities of "blond" hashish and white powder substance in baggies, alleged to be cocaine.

The Affiant believes that this confidential informant is both credible and reliable because the informant has provided information in the past leading to the seizure of controlled substances within the last three years on a regular basis. This informant's information has directly led to at least three arrests and convictions during the same period of time.

7. The Affiant has checked the suspect's active Ohio driver's license and discovered that the suspect's address listed with the Bureau of Motor Vehicles is 1919 Grangeview Drive, City of Beavercreek, Greene County, Ohio.

8. Affiant states that it is necessary to conduct a nighttime search because all purchases listed above took place at the residence in the evening hours; furthermore, two related search warrants are being prepared and served during the nighttime hours of April 21, 1982 in Montgomery County, Ohio. It is necessary for a successful seizure that all three search warrants be issued on the same night.

Based on the above, the Affiant has good cause to believe that large quantities of "blond" hashish and cocaine are located in the Thomas Charles Hotop residence. Therefore, Affiant seeks authorization to search and seize any

items of property which may be utilized in the prosecution for the offenses of possession of marijuana, possession of cocaine, trafficking in cocaine, trafficking in marijuana, and preparation for distribution of both cocaine and marijuana, contrary to and in violation of the Ohio Revised Code.

Affiant further sayeth naught.

.....

Det. Robert Clemmer

Sworn to before me and subscribed in my presence this 21st day of April, 1982.

.....

Judge Karl Wettlaufer

APPENDIX E

Excerpts from Suppression Hearing

* * * * *

[22] Q. Had you had this house staked out for any period of time before you got the search warrant? A. Yes. We started surveillance on the house when we were contacted by the first informant approximately on the 16th of April.

Q. And were there any other automobiles parked in or around the house? A. On two occasions there were. The night before we executed the search warrant we had a controlled buy out in the residence and during that time that the controlled buy took place we observed three cars parked immediately on the premises of the residence in the driveway. Two of them were Mercedes which belonged to Thomas Hotop, or the registration came back to him. The third car was an older model, I think '67 or '68 Buick Wild Cat with a Kentucky plate.

Q. What registration did that come back to? **[23]** A. I don't recall the name. It was some girl, best I can recall.

Q. Are you familiar with the automobile Mr. Nedeczky may have been driving at that time? A. Well, later in the evening after searching the premises and once the Defendant was read his rights and I had sort of a conversation with him, we were going to check the cars parked on the premises and we asked him which car was his, and he stated he was driving the Buick Wild Cat.

Q. Same car you had seen there early in the week? A. That's correct.

The Court: Do you recall how many days it might have been there, Mr. Nedeczky's car?

The Witness: I can say for sure it was there the night before. Other than that, I don't recall.

Office - Supreme Court, U.S.
FILED
JUL 19 19[illegible]
ALEXANDER L. STEVAS,
CLERK

No. 82-2032

In the Supreme Court of the United States

October Term, 1982

GABRIEL C. NEDECZKY,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SECOND DISTRICT COURT OF APPEALS
GREENE COUNTY, OHIO

BRIEF FOR THE STATE OF OHIO IN OPPOSITION

WILLIAM F. SCHENCK
Counsel of Record
Office of Greene County Prosecutor
Third Floor
Greene County Court House
Xenia, Ohio 45385
(513) 376-5250
Attorney for Respondent

WILLIAM D. BYER
Counsel of Record
840 Western Reserve Building
Cleveland, Ohio 44113
(216) 781-7777
Attorney for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTION PRESENTED

Whether a search warrant authorizing the search of premises known to have been the site of drug trafficking extends to a briefcase owned by a person who had been in the residence for four or five days prior to the search, when the objects of the search could be concealed within the briefcase.

TABLE OF CONTENTS

QUESTION PRESENTED I
TABLE OF AUTHORITIES IV
OPINIONS BELOW 2
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 5
STATEMENT OF FACTS 5
REASONS FOR DENYING WRIT 8

I. CERTIORARI SHOULD NOT BE GRANTED BECAUSE THIS APPEAL IS PREMATURE AND NOT RIPE FOR ADJUDICATION 8

II. CERTIORARI SHOULD BE DENIED BECAUSE THE COURT BELOW PROPERLY INTERPRETED AND APPLIED THE CASES PREVIOUSLY DECIDED BY THIS COURT 10

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Berman v. United States, 302 U.S. 211 (1937) 9
Commonwealth v. Homsher, 427 A.2d 760 (Pa. Super. 1981) 11
Commonwealth v. Platou, 312 A.2d 29 (Pa. 1973) 11
Hoffman v. Knollwood, 135 Ohio St. 170 (1939) 9
State v. Chamberlain, 177 Ohio St. 104 (1964) 9, 10
State v. Davenport, 516 P.2d 65 (Haw. 1973) 11
State v. Nabarro, 525 P.2d 573 (Haw. 1974) 11
State v. Roberts, 106 Ohio App. 30 (Clark Cty. 1957) 9
State v. Wetzel, 118 Ohio App. 368 (Franklin Cty. 1963) 9
United States v. Branch, 545 F.2d 177 (D.C. Cir. 1976) 11
United States v. Combs, 468 F.2d 1390 (6th Cir. 1972), *cert. denied*, 411 U.S. 948 (1972) 13
United States v. DeSimone, 660 F.2d 532 (5th Cir. 1981), *cert. denied*, ... U.S. ....., 102 S. Ct. 1732 (1981) 11, 13
United States v. DiRe, 332 U.S. 581 (1948) 12
United States v. Gentry, 642 F.2d 358 (10th Cir. 1981) 11
United States v. Johnson, 475 F.2d 977 (D.C. Cir. 1973) 11
United States v. Kralik, 611 F.2d 343 (10th Cir. 1979), *cert. denied*, 445 U.S. 953 11
United States v. Micheli, 487 F.2d 429 (1st Cir. 1973) 11
United States v. Morris, 647 F.2d 573 (5th Cir. 1981) 13
United States v. Neet, 504 F. Supp. 1220 (D. Col. 1981) 11
United States v. Ross, ... U.S. ....., 102 S. Ct. 2157 (1982) 10, 11, 12
United States v. Teller, 397 F.2d 494 (7th Cir. 1968), *cert. denied*, 393 U.S. 937 (1968) 11

Walker v. United States, 327 F.2d 597 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 956 (1964) 11
Ybarra v. Illinois, 444 U.S. 85 (1979) 11, 12

Constitutional Provisions

United States Constitution, Amendment IV 2, 10, 14
United States Constitution, Amendment XIV, §1 ..... 2, 10, 14

Statutory Authority

Ohio Revised Code Section 2505.02 ..... 4, 8, 9
Ohio Revised Code Section 2925.03(A)(6) 3, 5
Ohio Revised Code Section 2925.11(A) 3, 5
Ohio Revised Code Section 2945.67 ..... 3, 5
Ohio Revised Code Section 2953.02 ..... 3, 8

Rules

Ohio Criminal Rule of Procedure 12(J) 4, 5

No. 82-2032

In the Supreme Court of the United States

October Term, 1982

GABRIEL C. NEDECZKY,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SECOND DISTRICT COURT OF APPEALS
GREENE COUNTY, OHIO

BRIEF FOR THE STATE OF OHIO IN OPPOSITION

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, State of Ohio, respectfully requests that this Honorable Court dismiss this petition for a writ of certiorari, or, in the alternative, deny issuance of the writ requested by the Petitioner.

OPINIONS BELOW

The opinions of the Common Pleas Court of Greene County, Ohio, the Second District Court of Appeals, Greene County, Ohio, and the Ohio Supreme Court are printed in the Appendices of the Petition filed by the Petitioner, Appendix "C," "B," and "A" respectively.

JURISDICTION

The Petitioner is claiming jurisdiction under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Amendment IV:

"The right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV, §1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Revised Code

§2925.03(A)(6)

"No person shall knowingly do any of the following:
* * * * *
(6) Possess a controlled substance in an amount equal to or exceeding three times the bulk amount; * * *"

§2925.11(A)

"No person shall knowingly obtain, possess, or use a controlled substance."

§2945.67

"A prosecuting attorney, village solicitor, city director of law, or the attorney general may appeal as a matter of right any decision of a trial court in a criminal case, or any decision of a juvenile court in a delinquency case, which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief pursuant to R.C. 2953.21 to 2953.24, and may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case or of the juvenile court in a delinquency case."

§2953.02

"In a criminal case, including a conviction for the violation of an ordinance of a municipal corporation, the judgment or final order of a court of record inferior to the court of appeals may be reviewed in the court of appeals * * *"

§2505.02

"An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon summary application in an action after judgment, or an order vacating or setting aside a judgment and ordering a new trial is a final order which may be reviewed, affirmed, modified, or reversed, with or without trial. * * *"

Ohio Criminal Rule of Procedure 12(J)

"The state may take an appeal as of right from the granting of a motion for the return of seized property, or from the granting of a motion to suppress evidence if, in addition to filing a notice of appeal, the prosecuting attorney certified that: (1) the appeal is not taken for the purpose of delay; and (2) the granting of the motion has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.

Such appeal shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be diligently prosecuted.

If the defendant has not previously been released, he shall, except in capital cases, be released from custody on his own recognizance pending such appeal when the prosecuting attorney files the notice of appeal and certification.

This appeal shall take precedence over all other appeals."

STATEMENT OF THE CASE

On April 22, 1982, the Petitioner, Gabriel Nedeczky, was indicted on two counts of possession of controlled substances, violations of Ohio Revised Code Sections 2925.03(A)(6) and 2925.11(A).

After arraignment, the Petitioner moved for suppression of evidence which was to be used against him. A suppression hearing was conducted on June 17, 1982. On July 2, 1982, the court sustained the motion.

Because suppression of the evidence would render the State's case so weak that any reasonable possibility of prosecution would be destroyed, the State elected to appeal this case pursuant to Criminal Rule of Procedure 12(J) and Ohio Revised Code Section 2945.67. Notice of appeal was filed on July 8, 1982.

Following the filing of briefs and arguments, the Second District Court of Appeals reversed the trial court's decision to suppress the evidence. No plea was entered, nor was trial held.

Thereafter, the Petitioner requested leave to appeal, and the Supreme Court of Ohio declined to exercise its jurisdiction.

STATEMENT OF FACTS

On April 21, 1982, a search warrant was obtained for the search of the residence of Thomas Charles Hotop. The warrant authorized the search for and seizure of drugs, cash, and drug paraphernalia. (See Appendix D, Petition for Certiorari.)

Underlying the search warrant were the following facts, *inter alia*:

1. The affiant, Robert Clemmer of the Dayton Organized Crime Unit, had received information from a confidential, reliable informant who stated that Hotop was selling large quantities of hashish and cocaine at his residence;

2. The informant had seen a sale occur involving three white male subjects on April 16, 1982;

3. The informant had also purchased hashish from Hotop on April 16, 1982;

4. A second confidential, reliable informant had seen large quantities of blond hashish and white powder in baggies on April 20, 1982.

(See Appendix D, Petition for Certiorari.)

The search warrant was directed toward the seizure of drugs and evidence of drug trafficking. Because of a coordinated effort, the search was an authorized nighttime search.

Officers arrived at the Hotop residence to execute the search warrant. They knocked on the door, yelled that they were police officers and that they had a search warrant. Det. Robert Clemmer heard people running around inside, and he positioned himself at a window. (Supp. Hrg. at 20.) He saw two subjects, one of whom was the Petitioner, Gabriel Nedeczky.

Det. Clemmer testified that he saw the Petitioner run over to the sink and put his hands in the left side of the sink, take his hands out, wipe them on his pants, and walk to the door, which he opened. (Supp. Hrg. at 21.) On the other hand, the Petitioner denied having gone to

the sink. He stated he went to the door when the knocking started. (Supp. Hrg. at 10-12.)

When the sink was examined, water was trapped in the left side; there were approximately six plastic bags floating in the water. Dishes were also in the sink. (Supp. Hrg. at 21.)

The water was drained into some containers. (Supp. Hrg. at 21.) Testing revealed that the water contained cocaine. (Supp. Hrg. at 22.) Other cocaine was seized along with large sums of money.

In the rear bedroom of Hotop's residence, two briefcases were found. One was opened by Det. Clemmer, and it revealed large sums of money; the other was found in the closet. Det. Modesitt took that briefcase to another room because it was locked. (Supp. Hrg. at 24.) Det. Modesitt carried the briefcase to Hotop and asked him if it was his. Modesitt was informed that the briefcase belonged to the Petitioner. According to the Defendant's testimony, the briefcase did belong to him. He had been staying in the house for four or five days. (Supp. Hrg. at 7.)

The accounts of the Petitioner and the officers differ as to what was stated to the Petitioner, but it appears that the Petitioner refused consent and the briefcase was forced open. Inside the briefcase were drugs: methaqualone and cocaine. (Supp. Hrg. at 29.)

The trial court ruled that there was no consent for the search and that no exigent circumstances existed. (See Appendix C, Petition for Certiorari.) After so doing, the court suppressed the evidence. The Second District Court of Appeals reversed the order suppressing the evidence.

The Petitioner applied for leave to appeal to the Ohio Supreme Court, and leave was denied.

REASONS FOR DENYING WRIT

I. CERTIORARI SHOULD NOT BE GRANTED BECAUSE THIS APPEAL IS PREMATURE AND NOT RIPE FOR ADJUDICATION.

The sole issue which is being raised by the Petitioner is that certain evidence which was seized during the execution of a search warrant should be suppressed. However, there has been no conviction in this case.

Procedurally, the case has followed this course: the trial court suppressed the evidence being contested; the Respondent appealed the ruling on the suppression; a reversal was obtained from the Second District Court of Appeals; upon remand, the Petitioner was granted a continuance and filed a motion for leave to appeal in the Supreme Court of Ohio. Leave to appeal was denied by the Ohio Supreme Court, and a petition for certiorari was filed in this Court.

Section 2953.02 of the Ohio Revised Code provides that a judgment or final order of a court of record may be reviewed in the court of appeals. However, it is apparent that there has been no final judgment here. Equally apparent is the fact that the order entered by the appellate court, which in essence overruled the motion for suppression filed in the case below, is not the type of final order from which an appeal lies. Section 2505.02 of the Ohio Revised Code defines a final order and reads, in part: "An order affecting a substantial right in an action which in effect determines the action and prevents a judgment . . . is a final order . . ."

In Ohio, the Supreme Court has examined the requirements for criminal appeals. In *State v. Chamberlain*, 177

Ohio St. 104 (1964), the Court was deciding whether an order of the trial court overruling the defendant's motion to withdraw his guilty plea was an appealable order or final judgment from which the defendant could appeal. Turning to the case of *Berman v. United States,* 302 U.S. 211 (1937), Chief Justice Hughes stated: "Final judgment in a criminal case means sentence. The sentence is the judgment." *Id.* at 212. Further discussing the matter, the Supreme Court of Ohio stated: "From the foregoing cases, it appears that in a criminal case there must be a sentence which constitutes a judgment or a final order which amounts 'to a disposition of the cause' before there is a basis for appeal." 177 Ohio St. at 107.

It is submitted that this case has been brought to this Court prematurely. It has been held in one reported decision of an appellate court in Ohio that the overruling of a motion to suppress is not a final appealable order. *State v. Wetzel,* 118 Ohio App. 368 (Franklin Cty. 1963). The State contends this is the proper view. Unless an order falls within the statutory limitations of Revised Code Section 2505.02, there is no right to appeal. See *Hoffman v. Knollwood,* 135 Ohio St. 170 (1939); *State v. Roberts,* 106 Ohio App. 30 (Clark Cty. 1957). The fact that the order overruling the motion to suppress was entered by the court of appeals rather than the trial court should not convert the denial into an appealable order.

It would be difficult to find a case in which the judgment was more certain than in the case of *State v. Chamberlain, supra.* In that case, the defendant had previously pled guilty and subsequently made a motion to withdraw his guilty plea. The *Chamberlain* court stated:

> The order here, the overruling of defendant's motion, did not prevent a judgment but in effect made possible the entering of judgment. Thus, the overruling of the

> motion was merely interlocutory in nature and did not amount "to a disposition of the cause."

177 Ohio St. at 107.

In a case such as the case at bar, the petitioner is in the same position now as he would have been if the trial court had overruled his motion to suppress in the first instance. He has not been convicted, and it is conceivable that he would not be convicted. Therefore, this case has been brought to the Supreme Court prematurely and should be dismissed.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE COURT BELOW PROPERLY INTERPRETED AND APPLIED THE CASES PREVIOUSLY DECIDED BY THIS COURT.

Starting with the proposition that a search warrant for premises authorizes a search of containers which could conceal the object(s) of the search and which are found within the premises, the State submits that the search of the briefcase in the case at bar was permissible, and did not violate the Fourth and Fourteenth Amendments to the United States Constitution.

A recently issued decision by this Court defined the scope of a search of premises. *United States v. Ross,* ..... U.S. ....., 102 S. Ct. 2157 (1982). Although dealing with car searches, the Court compared the search of containers found within a vehicle after probable cause arises to searches of containers found on premises:

> A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that au-

thorizes an officer to search a home for illegal weapons also provides adequate authority to open closets, chests, drawers, and containers in which the weapon might be found.

In the instant case, the officers had a warrant authorizing the search of Thomas Hotop's residence for cocaine, marijuana, cash, receipts, and drug paraphernalia. It seems eminently reasonable, based upon the Supreme Court's rationale in *Ross*, to believe that a briefcase falls within the scope of this search warrant. While the Court in *Ross* did not decide the specific question presented in this case, the opinion did speak to the issue of the search of closed containers pursuant to a legally authorized search. Other federal and state courts have addressed the specific question presented here, although the State of Ohio has no reported decisions regarding this issue. *United States v. Gentry*, 642 F.2d 358 (10th Cir. 1981); *United States v. DeSimone*, 660 F.2d 532 (5th Cir. 1981), *cert. denied*, ... U.S. ....., 102 S. Ct. 1732 (1981); *United States v. Kralik*, 611 F.2d 343 (10th Cir. 1979), *cert. denied*, 445 U.S. 953; *United States v. Johnson*, 475 F.2d 977 (D.C. Cir. 1973); *State v. Davenport*, 516 P.2d 65 (Haw. 1973); *United States v. Teller*, 397 F.2d 494 (7th Cir. 1968), *cert. denied*, 393 U.S. 937 (1968); *Walker v. United States*, 327 F.2d 597 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 956 (1964); *State v. Nabarro*, 525 P.2d 573 (Haw. 1974); *Commonwealth v. Platou*, 312 A.2d 29 (Pa. 1973); *United States v. Micheli*, 487 F.2d 429 (1st Cir. 1973); *Commonwealth v. Homsher*, 427 A.2d 760 (Pa. Super. 1981); *United States v. Branch*, 545 F.2d 177 (D.C. Cir. 1976); *United States v. Neet*, 504 F. Supp. 1220 (D. Col. 1981).

The case upon which the Petitioner relies heavily is easily distinguishable on its facts. In *Ybarra v. Illinois*, 444 U.S. 85 (1979), there was no allegation in the affidavit

of drug trafficking. The search warrant authorized search for evidence of possession and other evidence of preparation for sale. The facts differ from the case at bar: the affidavit indicates that Hotop was using his residence as a place for sale of drugs and that two separate sales had occurred on the premises within four days. The Petitioner's automobile had been observed at the residence at the time of the drug trafficking. Furthermore, the briefcase was located in the vicinity of another briefcase which contained large sums of money. More importantly, however, is the fact that *Ybarra* involved the search of a person, and not of a container located elsewhere on the premises. Likewise, in *United States v. DiRe,* 332 U.S. 581 (1948), the Court was concerned with the personal search of the occupants of a car. Search of the briefcase in the case at bar was logical and fell within the scope of the warrant.

The Court of Appeals of Greene County did not hold, as is contended by the Petitioner, that *Ross* controls in all cases involving the search of containers. The decision of the appellate court is limited to the facts of this case. The court found that Nedeczky had more than a casual visitor status to the premises. That, coupled with the fact that the search warrant authorized search for drugs and other evidence of drug trafficking which could logically be concealed within the briefcase, was the basis of finding that the search warrant authorized the search of the Petitioner's briefcase. The court did not hold, however, that persons could be searched.

Respondent is not urging this Court to find that the *Ross* decision implicitly overrules *Ybarra,* as the Petitioner has stated. Both decisions are valid and deal with different issues. The State submits that even though the officers knew, or had been informed, of the ownership of

the briefcase, under the facts of this case they were not under an additional duty to obtain another search warrant before they could open the briefcase. Given the underlying facts in the affidavit and the activity surrounding the execution of the warrant, the Respondent contends that the scope of the warrant covered any containers in the residence which could logically contain drugs or other items specified in the warrant.

Ironically, if the Respondent were to be required to obtain an additional search warrant in this case, the affidavit would be substantially the same, with the addition of allegations as to the Petitioner's briefcase. The Respondent submits that if such a requirement were imposed, the result would approach the idea that a warrant must be obtained for any container within a container. See *United States v. Morris,* 647 F.2d 573 (5th Cir. 1981); *United States v. DeSimone, supra; United States v. Combs,* 468 F.2d 1390 (6th Cir. 1972), *cert. denied,* 411 U.S. 948 (1972).

If the Petitioner's interpretation were applied, a problem would arise in that the Respondent would have to rely upon the word of a person on the premises as to ownership of containers. It would be possible for the target of a search warrant to completely circumvent the warrant by claiming that an item on the premises did not belong to him, but belonged to someone else on the premises at the time. To protect itself from suppression of that evidence, the State would be forced to acquire additional warrants or risk having evidence thrown out prior to trial.

Under the circumstances in this case, the Respondent submits that the search of the Petitioner's briefcase was permissible because the search warrant for the search of Hotop's residence included the briefcase within its

scope. The Second District Court of Appeals, Greene County, Ohio, correctly ruled that suppression of the evidence contained within the Petitioner's briefcase was error.

CONCLUSION

It is respectfully requested that this Honorable Court dismiss the Petition for Writ of Certiorari filed in this case, or in the alternative deny issuance of a writ of certiorari. It is submitted that this Petition is premature because the Petitioner has not been convicted of any crime, nor has there been a final judgment or final appealable order in this case. Additionally, the Respondent contends that the interpretation of Constitutional Amendments IV and XIV were correctly considered by the Greene County Court of Appeals, and that the constitutional principles delineated in this Court's prior decisions were followed.

Respectfully submitted,

WILLIAM F. SCHENCK
Counsel of Record
Third Floor
Greene County Court House
Xenia, Ohio 45385
(513) 376-5250
Attorney for Respondent

Office-Supreme Court, U.S.
FILED
SEP 12 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-2032

In the Supreme Court of the United States

October Term, 1982

GABRIEL C. NEDECZKY,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEALS GREENE COUNTY, OHIO

REPLY BRIEF OF PETITIONER

WILLIAM D. BEYER
Counsel of Record
840 Western Reserve Building
1468 West Ninth Street
Cleveland, Ohio 44113
(216) 781-7777
Attorney for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

TABLE OF AUTHORITIES I
STATEMENT OF THE FACTS 2
REASONS FOR GRANTING WRIT 2

I. The Instant Petition Presents a Final Appealable Order Which Is Ripe for Adjudication 2

II. Certiorari Should Be Granted Because the State Court Decision Allows for Searches Absent Probable Cause 6

TABLE OF AUTHORITIES

Cases

California v. Stewart, decided *sub nom. Miranda v. Arizona*, 384 U.S. 436 (1966) 5

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1974) 5

Gospel Army v. Los Angeles, 331 U.S. 543 (1947) 3

Johnson v. United States, 333 U.S. 10 (1948) 7

Lesh v. Lesh, 138 Ohio St. 492 (1941) 3

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1973) 5

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) 5

Stone v. Powell, 428 U.S. 465 (1976) 5

United States v. Di Re, 332 U.S. 581 (1948) 7

United States v. Ross, 102 S. Ct. 2157 (1982) 6

Statutory Authority

Ohio Revised Code Section 2945.67 3

Rules

Ohio Criminal Rule of Procedure 12(J) 3

Miscellaneous

4 OHIO JUR. 2d 253, *Appellate Review*, §109 3

No. 82-2032

In the Supreme Court of the United States

October Term, 1982

GABRIEL C. NEDECZKY,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEALS
GREENE COUNTY, OHIO

REPLY BRIEF OF PETITIONER

To The Honorable Chief Justice And Associate Justices of the Supreme Court of the United States:

Petitioner, Gabriel C. Nedeczky, respectfully submits the instant Reply Brief Of Petitioner and respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for Greene County, Ohio, which judgment became final on April 13, 1983, when the Supreme Court of Ohio dismissed petitioner's Memorandum In Support Of Jurisdiction and denied further appellate review.

STATEMENT OF THE FACTS

On page 7 of its Brief For The State Of Ohio In Opposition, Respondent alleges that petitioner had been staying at the searched premises for four or five days prior to the search. In support of this contention, respondent cites to the testimony of petitioner at the suppression hearing. It is clear from an examination of the affidavit, search warrant and transcript of the suppression hearing that neither the issuing magistrate nor the executing officers at the time of the search was aware of the length of petitioner's visit.

Indeed, the only connection between petitioner and the searched premises was that petitioner's car had been parked near the house on the night before the search. However, it was not until *after* the search of petitioner's briefcase had been completed that the officers became aware that said car belonged to petitioner (Tr. 22-23).

REASONS FOR GRANTING WRIT

I. THE INSTANT PETITION PRESENTS A FINAL APPEALABLE ORDER WHICH IS RIPE FOR ADJUDICATION.

Respondent, in the first of its Reasons For Denying Writ, engages in a novel bit of sophistry, which seems to highlight its recognition of the weakness of its argument on the merits.

Respondent notes that petitioner would have had no right to an immediate appeal had the *trial court* overruled his Motion To Suppress. Thus, respondent argues that, since the ruling of the Court of Appeals accomplishes the

same result (i.e., non-suppression), petitioner has no right to prosecute the instant appellate action. Respondent contends that petitioner's right to pursue the instant relief cannot arise until and unless petitioner is subsequently convicted.

Respondent's argument is misleading and should be rejected for several reasons. First the Court of Appeals ruled upon all issues presented to it. Nothing remained for the appellate court to resolve. Its judgment, thus, constitutes a final, appealable order.

> A judgment of a reviewing court, the Ohio Supreme Court has declared, is complete, final and further appealable, when its action and instructions to the trial court are definitely stated, the reason therefor is clearly recited, no required action is omitted, and the cause is remanded to the trial court for retrial.

4 OHIO JUR. 2d 253, *Appellate Review,* §109. *See also, Lesh v. Lesh,* 138 Ohio St. 492 (1941).

The United States Supreme Court has recognized a similar standard in *Gospel Army v. Los Angeles,* 331 U.S. 543, at 547 (1947), where it noted that a judgment would be considered final and appealable where "the record shows that the order of the appellate court has in fact fully adjudicated rights and that *that* adjudication is not subject to further review by a state court . . ." (Emphasis added).

The second reason why respondent's argument should be rejected is that the instant ruling was not made by the trial court, but rather by the Ohio Court of Appeals. Pursuant to Section 2945.67 of the Ohio Revised Code and Rule 12(J) of the Ohio Rules of Criminal Procedure, respondent was permitted to appeal the trial court's order

suppressing physical evidence. Such legislative directives clearly treat a trial court's order to suppress evidence as final and appealable. It is, thus, illogical to treat such orders as final for purposes of appeal within the Ohio judicial system and otherwise for purposes of appellate review by this Court.

Third, such illogic is dramatically illustrated by an examination of the direct result of respondent's reasoning—i.e., that petitioner would *forever* be barred from presenting the instant issue for Supreme Court review. If this case were now remanded and petitioner were acquitted, the instant constitutional issue would become moot. If, on the other hand, petitioner were convicted based on the physical evidence he had sought to suppress, he would be unable, at that time, to appeal the trial court's judgment to the Ohio Court of Appeals—principles of *res judicata* would preclude such appeal, since the suppression issue has already been decided. Accordingly, it would be impossible for petitioner to ever present this Constitutional issue for Supreme Court review.

This Court has recognized that such a judgment, which does not dispose of or adjudicate the entire case or controversy, might still be treated as final and subject to Supreme Court review:

> In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, governing state law would not permit him

> again to present his federal claim for review. This Court has taken jurisdiction in these circumstances prior to completion of the case in the state courts.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 481 (1974). *See also, North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973); *California v. Stewart*, decided *sub nom. Miranda v. Arizona*, 384 U.S. 436 (1966).

In the instant matter, further state review of the Fourth Amendment suppression issue will be precluded, regardless of how the trial court decides this case on the merits. If petitioner is acquitted, the issue will be moot; if he is convicted, state appellate review will be precluded on the basis of *res judicata*. Accordingly, unless this Court asserts its jurisdiction herein, the erroneous decision of the Ohio Court of Appeals will stand until and unless challenged in a subsequent case after conviction.[1]

Moreover, as demonstrated in the Petition For A Writ Of Certiorari, such decision of the Ohio Court of Appeals stands in direct conflict with that of the State of Pennsylvania. Furthermore, much confusion exists among lower federal courts with respect to the issue herein presented. Therefore, this Court should assert its jurisdiction in this matter, rather than leave this significant constitutional question unanswered. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1973).

---

1. Under this Court's doctrine of *Stone v. Powell*, 428 U.S. 465 (1976), relief by way of habeas corpus may not be available to petitioner regardless of the ultimate decision of the trial court in this case.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE STATE COURT DECISION ALLOWS FOR SEARCHES ABSENT PROBABLE CAUSE.

Respondent, in the second of its Reasons For Denying Writ, puts forth a number of arguments, none of which is compelling. Respondent's first argument—that the principles of *United States v. Ross,* 102 S. Ct. 2157 (1982) legitimize the subject search—has been adequately discussed in the Petition, and will not be further controverted herein.

Respondent's second argument is, essentially, that Hotop was known to have engaged in drug transactions earlier in the week of the subject search and that petitioner's car was present at or near the premises during one of these transactions. Because of these "facts," respondent concludes that the scope of the warrant may be deemed to have encompassed petitioner. Respondent's argument is seriously flawed.

First, it is clear that neither the search warrant nor the affidavit in support thereof made any reference to petitioner—either express or implied—and cannot be construed as a finding of probable cause relative to petitioner. Second, although respondent argues that petitioner had been present at Hotop's residence for four or five days prior to the search, it is clear that the executing officers were not aware of the duration of such visit *until petitioner testified at the suppression hearing.* Third, the officers executing the subject warrant were not aware *until after the search had been completed* that petitioner even owned a car, much less one that was present earlier in the week (Tr. 22-23). Thus, at the time of the search, the executing officers knew only that petitioner was present on the premises. No information, *subsequently*

discovered, can serve to render such a search constitutionally valid, since probable cause is to be determined as of the time of a search. *Johnson v. United States,* 333 U.S. 10 (1948); *United States v. Di Re,* 332 U.S. 581 (1948).

Respondent's third argument, as stated on page 13 of its Brief, is that

> . . . if Respondent were to be required to obtain an additional search warrant in this case, the affidavit would be substantially the same with the addition of allegations as to the Petitioner's briefcase.

Respondent thus implies that such a requirement would be redundant and purposeless. Nothing could be further from the truth. Such an affidavit would have to state more than just the fact that a briefcase was present on the premises during the search. It would be required to state that such briefcase belonged to a visitor and to state grounds establishing probable cause as to the visitor's property.[2] To allow a search of a visitor's belongings without such an affidavit would be to sanction the transfer of a probable cause finding from one person to another. Thus, the requirement of an additional affidavit and warrant is anything but redundant. Such a requirement would permit a neutral and detached magistrate to make a judicial finding of probable cause as to an item which could not

---

2. Respondent's position is that, where executing officers encounter a container known to belong to a third party visitor, a search warrant for such container should not be required, since a warrant would automatically be granted upon submission of the original affidavit along with an addendum stating they had also located a visitor's belongings. Surely, such position is untenable. Would a warrant automatically issue to search the tool box of a television repairman who happened to be present on the premises during the time of a search? Or to search the medical bag of a physician who was treating someone in the house during the execution of the warrant?

have been expected to have been found on the searched premises.

Respondent's final argument is that petitioner's interpretation of the law would force law enforcement officers to rely upon the word of a person on the premises as to the ownership of containers. Such argument represents a severe distortion of petitioner's position and of the established facts of this case. Clearly, it is uncontroverted that the executing officers, in fact, believed it to be petitioner's property.[3]

Obviously, it is possible for the owner of a searched residence to falsely claim that a briefcase containing incriminating evidence is the property of a visitor to the premises. The instant petition does not suggest that executing officers must, in all instances, believe such representations and thereby forego their search of such a briefcase. Clearly, such a requirement would have the ultimate effect of preventing a search whenever a criminal suspect

---

3. Indeed, the executing officers had every reason to believe that the briefcase belonged to petitioner, rather than to Hotop, the owner of the premises. There existed no reason to doubt Hotop's statement that the briefcase belonged to petitioner. Hotop had already voluntarily directed the police to substantial evidence incriminating himself. Thus, when Hotop informed the police that the briefcase belonged to petitioner, he had no reason to be untruthful. Moreover, William Modesitt—the officer who conducted the search of petitioner's briefcase—testified as follows at the suppression hearing:

> Q: Just to make clear for the record, Mr. Modesitt, you knew prior to breaking open this case that it belonged to the defendant here, it was not Mr. Hotop's? There was no doubt in your mind at this point?
>
> A: That's correct.

Tr. 34.

Finally, the fact that the executing officers felt it necessary to seek petitioner's permission to open the briefcase is compelling proof that they knew it to be his property (Tr. 5, 15, 31, 32).

arranges to have a "visitor" on the premises who will claim title to such a container. Of course, if one can anticipate a search and arrange to have a visitor present at the time of its execution, he could just as easily avoid the confiscation of his property by secreting it elsewhere.

In any event, the facts of the instant case are clear that the executing officers held no such good faith doubt that the subject briefcase belonged to petitioner. Accordingly, it is unnecessary in the instant proceeding to consider this issue.

Therefore, for the foregoing reasons, this Court should reject the arguments set forth in Respondent's Reasons For Denying Writ and should assert its jurisdiction to resolve this matter.

Respectfully submitted,

WILLIAM D. BEYER
Counsel of Record
840 Western Reserve Building
1468 West Ninth Street
Cleveland, Ohio 44113
(216) 781-7777
Attorney for Petitioner